Kajing Tubek & Ors v Ekran Bhd & Ors

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S5-21-60-1995
JAMES FOONG J
19 JUNE 1996

Environmental Law *— Environmental Quality Act 1974 — Whether Minister permitted to make amendments retrospectively — Environmental Quality Act 1974 — Interpretation Act 1948, 1967 s 20*

Civil Procedure *— Declaration — Application for — Hydroelectric project in Sarawak approved without adherence to procedures set down in environmental legislation and guidelines — Plaintiffs deprived of vested rights to obtain copy of environmental assessment report and to make representations to review panel on project — Legislation provided for penal offence in the event of breach — Whether plaintiff entitled to declaration as private individual — Environmental Quality Act 1974 s 34A*

Civil Procedure *— Locus standi — Allegation of plaintiffs that hydroelectric project would destroy their homes and lives — Plaintiffs sought declaration that project approved without adherence to procedures set down in environmental legislation and guidelines — Whether plaintiffs had substantial or genuine interest to have legal position declared*

The plaintiffs were residents of longhouses in Belaga, Sarawak who were affected by the Government's proposed development of a hydroelectric project in Bakun covering approximately 69,640 hectares of land ('Bakun HEP'). The first defendant was the project proponent of the Bakun HEP; the second defendant was the Director General of Environmental Quality; the third defendant was the Government of Malaysia; the fourth defendant was the Natural Resources and Environment Board and the fifth defendant was the Sarawak State Government. The plaintiff sought a declaration that before the first defendant carried out the construction of the Bakun HEP, they had to comply with the Environmental Quality Act of 1974 (the 'EQA'), the guidelines prescribed under s 34A of the Act, and the regulations made thereunder. Under the EQA, certain prescribed activities could only be carried out with the approval of the Director General of Environmental Quality ('the prescribed activities'). Specifically, s 34A of the EQA imposed a duty upon any person who carries out any of the prescribed activities to submit a resport to the Director General, containing an assessment of the environmental impact of the proposed activity and a proposal of measures that shall be undertaken to control any adverse environmental impact (the 'EIA'). According to guidelines issued by the Director General, such EIA must be made available to the public and the public are invited to comment on the proposed project to a review penal, which is an independent body. This review panel would then make recommendations to the Director General for his consideration and approval. However, by an order made by the Minister known as the Environmental Quality (Prescribed Activities) (Environmental Impact

A Assessment) (Amendment) Order 1995 (the 'Minister's Order') it was provided that the prescribed activities shall not apply to Sarawak. Subsequently, the Director General issued a press release stating that the EIA prepared by the first defendant was subject to the Sarawak Natural Resources and Environment (Prescribed Activities) Order 1994 (the 'Sarawak Order'), and not the regulations made under the B EQA by the Federal Government. As the Sarawak Order did not have any provisions on the public's entitlement to a copy of the EIA and for subsequent public comments to be submitted to the review panel before an approval could be granted by the Director General, the State Natural Resource Board could review and approve the EIA. C The EIA submitted by the first defendant was accordingly considered and approved. By these acts of the defendants, the plaintiffs claimed that they had been deprived of their accrued/vested rights to obtain a copy of the EIA, to be heard and make representation before the EIA is approved. The defendants contended that: (a) the plaintiffs had no locus standi to bring the action as they had not suffered any D specific, direct or substantial damage which was different from that common to the rest of the public; (b) as the EQA had provided for a penal offence in the event of breach of s 34A, a declaration sought for by the plaintiffs as private individuals cannot be entertained; (c) the court's power to make declaratory judgments was confined to E matters which were justiciable in the High Court, and to grant the plaintiffs' declaration would entail the court enforcing on the state of Sarawak, laws and regulations which Parliament did not have legislative authority to enact; (d) the Minister's order suspending the application of the prescribed activities to Sarawak merely amended the procedure for the approval of the EIA from the Director General F to the Sarawak Board and did not extinguish any vested/accrued rights of the plaintiffs; (e) the underlying objective of the plaintiffs was to avoid losing their land, crops, houses and ancestral burial sites if the Bakun HEP was to proceed and these were matters which could only be resolved under the provision of the Land Code of G Sarawak; (f) the proper relief is an order of mandamus against the second defendant to exercise its statutory duty under O 53 of the Rules of the High Court and not by way of declaration as the substance of the plaintiffs' grievances were actually against the second and third defendants for the purported abdication of its statutory powers. The plaintiffs' contentions were that : (a) the Minister's H power under s 34A of the EQA was restricted to prescribing of activities which fell under s 34A but not to suspend the application of these activities to the state of Sarawak; (b) though the Minister's order was made retrospectively, this was done under s 34A of the EQA which did not provide the Minister with a power to amend the I law retrospectively.

Held, granting the declaration sought by the plaintiffs:

(1) The plaintiffs' claim that their homes and land would be destroyed, their lives uprooted by the project and that they would suffer far

more greatly and directly than other members of the public as their 'land and forest are not just a source of livelihood but constitute life itself, fundamental to their social cultural and spiritual survival as native peoples', was sufficient to justify the plaintiffs having a substantial or genuine interest to have a legal position declared (see p 399C–E).

(2) Even though there was provision for a criminal offence which provided for a penal remedy, the plaintiffs were entitled to seek their declaration as they had suffered specific, direct and substantial damages (see p 401F–G).

(3) The issue before this court concerned the validity of an order made by the Minister under s 34A of the EQA in its procedural aspect of its enactment. This was a real and substantial controversy which this court had jurisdiction to determine, irrespective of whether there existed a state law or a federal legislation governing a similar underlying subject matter. The matter to be determined is justiciable for this forum (see p 404F).

(4) The Minister has corresponding power to 'disprescribe' or 'unprescribe' any prescribed activities. When Parliament had delegated the Minister with power to prescribe any activity, it would be unjustifiable for him to return to the house on every single activity he wished to disprescribe which in his opinion had become unnecessary or inapplicable (see pp 404I and 405B–C).

(5) There was no express provision in the EQA to permit the Minister to make any amendments retrospectively. If he wished to avail himself of the powers in s 20 of the Interpretation Act to give effect to the retrospectively of his order, he must say so expressly (see p 405F).

(6) Under the guidelines issued by the Director General, public participation in the form of obtaining a copy of the EIA, commenting thereto and making representation was explicitly provided. All these were to be complied with before the review panel made its recommendation to the Director General who in turn takes into consideration these recommendations before arriving at a decision. This process was therefore mandatory and any decision made by the Director General without the above procedure being adhered to would be against the legal provisions of the EQA and its subsidiary legislation. With this, the entitlement to a copy of the EIA, commenting thereon by the public became a right and the plaintiffs were entitled to such rights (see p 407C–E).

(7) The Minister's order suspending the application of the prescribed activities to Sarawak was not about a transfer of procedure, but the extinction of the EQA in its application on certain material activities in Sarawak. Where a right to prosecute existed, it was no longer procedural but substantive (see p 407H–I).

(8) The plaintiffs' apprehension that their land, crops, houses and ancestral burial sites would be devastated if Bakun HEP were to

proceed did not extinguish their vested rights to make representations and be heard before the EIA was approved under the EQA. The rights of the plaintiffs under the EQA were distinct and separate from the rights under the Land Code of Sarawak. But this did not mean that just because the plaintiffs wished to enforce their rights under the EQA they possessed a sinister motive as claimed (see p 409A–C).

(9) The court would not refuse the plaintiffs' application solely on the ground that an alternative remedy was available. The court would consider the granting of the form of relief most likely to resolve the disputes between the parties (see p 409I).

[Bahasa Malaysia summary

Plaintif-plaintif merupakan penghuni rumah panjang di Belaga, Sarawak yang terjejas oleh pembangunan suatu projek hidroelektrik yang dicadangkan oleh kerajaan di Bakun yang meliputi kira-kira 69,640 ekar tanah ('PHE Bakun'). Defendan pertama ialah penyokong projek bagi PHE Bakun; defendan kedua ialah Ketua Pengarah, Jabatan Alam Sekitar; defendan ketiga ialah kerajaan Malaysia; defendan keempat ialah Lembaga Sumber Asli dan Persekitaran dan defendan kelima pula ialah kerajaan negeri Sarawak. Plaintif-plaintif telah memohon untuk satu deklarasi bahawa sebelum defendan pertama menjalankan pembinaan PHE Bakun, mereka harus mematuhi Akta Kualiti Alam Sekeliling 1974 ('KAS'), garis panduan yang ditentukan di bawah s 34A Akta itu dan peraturan-peraturan yang dibuat di bawahnya. Di bawah KAS itu, aktiviti tertentu yang ditetapkan hanya boleh dijalankan dengan kelulusan Ketua Pengarah Kualiti Alam Sekeliling ('aktiviti yang ditetapkan'). Khususnya, s 34A KAS telah mengenakan suatu kewajipan ke atas sesiapa yang menjalankan apa-apa aktiviti yang ditetapkan supaya mengemukakan suatu laporan kepada Ketua Pengarah tersebut mengandungi penilaian kesan alam sekeliling tentang aktiviti dicadangkan dan langkah-langkah yang dicadangkan untuk diambil bagi mengawal sebarang kesan yang merugikan kepada alam sekeliling ('PKAS'). Mengikut garis panduan yang dikeluarkan oleh Ketua Pengarah, PKAS tersebut harus disediakan untuk orang awam, dan orang awam akan dijemput membuat komen ke atas projek dicadangkan kepada panel kajian, yang merupakan suatu badan bebas. Panel kajian ini seterusnya akan membuat syor kepada Ketua Pengarah bagi pertimbangan dan kelulusannya. Namun demikian, melalui suatu perintah Menteri yang dikenali sebagai 'Perintah Kualiti Alam Sekeliling (Aktiviti yang Ditetapkan)(Penilaian Kesan kepada Alam Sekeliling) Pindaan 1995' ('perintah Menteri'), adalah diperuntukkan bahawa aktiviti yang ditetapkan tidak terpakai di Sarawak. Selepas itu, Ketua Pengarah telah mengeluarkan satu pernyataan akhbar yang menyatakan bahawa PKAS yang disediakan oleh defendan pertama adalah tertakluk kepada 'Perintah Sumber Asli dan Persekitaran (Aktiviti yang Ditetapkan) 1994' Sarawak ('perintah Sarawak') dan peraturan-peraturan yang

dibuat di bawah KAS oleh Kerajaan Persekutuan. Oleh kerana perintah Sarawak tidak mempunyai sebarang peruntukan mengenai hak orang awam terhadap PKAS dan komen awam untuk dikemukakan kepada panel kajian sebelum kelulusan boleh diberikan oleh Ketua Pengarah, Lembaga Sumber Asli Negeri boleh mengkaji dan meluluskan PKAS. Ekoran itu, PKAS yang dikemukakan oleh defendan pertama telah dipertimbangkan dan diluluskan. Menerusi tindakan defendan-defendan ini, plaintif-plaintif telah menuntut bahawa hak terakru/diletakkan ke atas mereka untuk memperolehi sesalinan PKAS, untuk didengar dan membuat representasi sebelum PKAS diluluskan telah terjejas. Defendan-defendan berhujah bahawa: (a) plaintif-plaintif tidak mempunyai locus standi untuk membawa tindakan ini sebab mereka tidak mengalami sebarang kerugian khusus, terus atau penting, yang berbeza daripada yang biasa dialami oleh orang awam yang lain; (b) oleh kerana KAS telah memperuntukkan kesalahan penal jika s 34A dilanggar, deklarasi yang diminta oleh plaintif-plaintif sebagai individu persendirian tidak boleh dilayan; (c) kuasa mahkamah untuk membuat penghakiman perisytiharan adalah terbatas kepada perkara yang boleh diadili di Mahkamah Tinggi, dan membenarkan deklarasi plaintif-plaintif bermakna mahkamah telah menguatkuasakan undang-undang dan peraturan yang Parlimen tidak mempunyai autoriti perundangan untuk menggubal, ke atas Sarawak; (d) perintah Menteri yang menggantung pemakaian aktiviti yang ditetapkan bagi Sarawak hanya meminda prosedur untuk kelulusan PKAS daripada Ketua Pengarah kepada lembaga Sarawak dan ia tidak melenyapkan sebarang hak terakru/diletakkan ke atas plaintif-plaintif; (e) objektif asas plaintif-plaintif adalah untuk mengelakkan kehilangan tanah, tanaman, rumah dan tapak pengebumian pusaka mereka jika PHE Bakun dibiarkan berterusan dan ini merupakan perkara yang hanya boleh diselesaikan di bawah peruntukan Kanun Tanah Sarawak; (f) relief yang betul ialah perintah mandamus terhadap defendan kedua untuk melaksanakan kewajipan statutorinya di bawah A 53 Kaedah-Kaedah Mahkamah Tinggi 1980 dan bukan melalui deklarasi kerana ketidakpuasan hati plaintif-plaintif sesungguhnya adalah terhadap defendan kedua dan ketiga yang telah melepaskan kuasa statutori. Hujahan plaintif-plaintif ialah bahawa: (a) kuasa Menteri di bawah s 34A KAS adalah terbatas kepada penetapan aktiviti yang dirangkumi oleh s 34A tetapi bukan untuk menggantung pemakaian aktiviti ini di negeri Sarawak; (b) walaupun perintah Menteri telah dibuat secara kebelakangan, ia telah dibuat di bawah s 34A KAS yang tidak memberi Menteri kuasa untuk meminda undang-undang secara kebelakangan.

Diputuskan, membenarkan deklarasi yang diminta oleh plaintif-plaintif:

(1) Tuntutan plaintif-plaintif bahawa rumah dan tanah mereka akan dibinasa, kehidupan mereka akan terjejas akibat projek itu, dan mereka akan menderita jauh lebih dan secara langsung berbanding

dengan orang awam lain sebab 'tanah dan hutan bukan sahaja merupakan sumber mata pencarian tetapi adalah kehidupan itu sendiri, yang merupakan asas kewujudan sosial, kebudayaan dan keagamaan mereka sebagai penduduk asal', adalah cukup sebagai justifikasi bahawa plaintif-plaintif mempunyai kepentingan yang mustahak atau sejati supaya kedudukan undang-undang mereka diisytiharkan (lihat ms 399C–E).

(2) Walaupun peruntukan itu adalah berkenaan dengan kesalahan jenayah yang meperuntukkan remedi penal, plaintif-plaintif berhak memohon untuk deklarasi sebab mereka telah mengalami kerugian yang khusus, terus dan penting (lihat ms 401F–G).

(3) Isu yang harus dipertimbangkan oleh mahkamah adalah berkaitan dengan kesahan suatu perintah yang dibuat oleh Menteri di bawah s 34A KAS dalam aspek prosedur enakmen. Ini merupakan satu kontroversi yang benar dan penting yang mahkamah ini mempunyai bidang kuasa untuk membuat keputusan, tanpa mengira sama ada undang-undang negeri atau perundangan persekutuan yang menguasai hal perkara yang sama wujud atau tidak. Perkara yang harus dipertimbangkan itu boleh diadili oleh forum ini (lihat ms 404F).

(4) Menteri mempunyai kuasa sepadan untuk 'menyahtetapkan' atau 'menetapkan' sebarang aktiviti yang ditetapkan. Apabila Parlimen menugaskan Menteri dengan kuasa untuk menetap sebarang aktiviti, adalah tidak berjustifikasi jika beliau melaporkan setiap aktiviti kepada dewan setiap kali beliau ingin menyahtetapkan sebarang aktiviti yang pada pendapatnya telah menjadi tidak perlu atau tidak terpakai (lihat ms 404I dan 405B–C).

(5) Tiadanya peruntukan nyata dalam KAS yang membenarkan Menteri membuat apa-apa pemindaan secara kebelakangan. Jika beliau ingin menggunakan kuasa dalam s 20 Akta Tafsiran bagi memberi kesan kepada perintah kebelakangan, beliau mesti mengatakan demikian secara nyata (lihat ms 405F).

(6) Di bawah garis panduan yang dikeluarkan oleh Ketua Pengarah, penyertaan awam secara pemerolehan sesalinan PKAS, membuat komen terhadapnya, dan membuat representasi, adalah diperuntukkan secara eksplisit. Semua ini harus dipatuhi sebelum panel kajian membuat syor kepada Ketua Pengarah yang kemudiannya akan mengambil kira syor ini sebelum membuat keputusan. Oleh yang demikian, proses ini adalah mandatori dan sebarang keputusan yang dibuat oleh Ketua Pengarah tanpa mematuhi prosedur di atas akan melanggar peruntukan undang-undang KAS dan perundangan subsidiari. Dengan ini, hak untuk sesalinan PKAS, dan membuat komen terhadapnya oleh orang awam adalah merupakan satu hak, yang harus diberikan kepada plaintif-plaintif (lihat ms 407C–E).

(7) Perintah Menteri untuk menggantung pemakaian aktiviti yang ditentukan di Sarawak bukan mengenai pemindahan prosedur,

tetapi kepupusan pemakaian KAS atas aktiviti tertentu yang material di Sarawak. Jika suatu hak untuk mendakwa wujud, ia bukan lagi berkenaan dengan prosedur tetapi substantif (lihat ms 407H–I).

(8) Kekhuatiran plaintif-plaintif bahawa tanah, tanaman, rumah dan tapak pengebumian pusaka mereka akan musnah jika PHE Bakun dibiarkan berterusan tidak melenyapkan hak yang diletakkan ke atas mereka untuk membuat representasi dan didengar sebelum PKAS diluluskan di bawah KAS. Hak plaintif-plaintif di bawah KAS adalah berlainan dan berasingan daripada hak di bawah Kanun Tanah Sarawak. Tetapi ini tidak bermakna bahawa oleh kerana plaintif-plaintif ingin menguatkuasa hak mereka di bawah KAS, mereka mempunyai motif jahat seperti yang dikatakan (lihat ms 409A–C).

(9) Mahkamah tidak akan menolak permohonan plaintif-plaintif semata-mata atas alasan bahawa terdapat suatu remedi alternatif. Mahkamah akan mempertimbangkan pemberian bentuk relief yang paling sesuai yang akan menyelesaikan pertikaian di antara pihak-pihak yang berkenaan (lihat ms 409I).]

Notes

For cases on declarations, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1104–1126.

For cases on locus standi, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2272–2290.

Cases referred to

Chief Assessor, Property Tax, Singapore v Howe Yoon Chong [1979] 1 MLJ 207

Government of Malaysia v Lim Kit Siang [1988] 2 MLJ 12

Hanson v Radcliffe Urban District Council [1922] 2 Ch 490

Howe Yoon Chong v Chief Assessor, Property Tax, Singapore [1978] 2 MLJ 87

Ibeneweka v Egbuna [1964] 1 WLR 219

Lonrho Ltd & Anor v Shell Petroleum Co Ltd & Anor (No 2) [1982] AC 173

Penang Development Corp v Teoh Eng Huat & Anor [1993] 2 MLJ 97

Petaling Tin Bhd v Lee Kian Chan & Ors [1994] 1 MLJ 657

Phillips v Eyre (1870) LR 6 QB 1

R v Secretary of State for the Home Department, ex p Al-Mehdawi [1989] 1 All ER 777

Salijah bte Ab Lateh v Mohd Irwan Abdullah [1996] 1 SLR 63

Tan Sri Hj Othman Saat v Mohamed bin Ismail [1982] 2 MLJ 177

Wong Pot Heng & Anor v Kerajaan Malaysia [1992] 2 MLJ 885

Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors [1983] 1 MLJ 213

Yew Bon Tew & Anor v Kenderaan Bas Mara [1983] 1 MLJ 1

Legislation referred to

Borneo States (Legislative Powers) Order 1963
Environment Quality Act of 1974 ss 34, 34A(1), (2), 34A(8)
Environment Quality (Prescribed Activities) (Environmental Impact Assessment) Order 1987 item 13(b)
Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) (Amendment) Order 1995 s 2
Federal Constitution arts 73, 74, 76A, 77, 95B, 95C, 128(1), (2) Ninth Schedule
Interpretation Acts 1948, 1967 ss 3, 20, 30(1)(b)
Natural Resources Ordinance (Cap 84) s 11A(1)
Natural Resources and Environment (Prescribed Activities) Order 1994 s 2(2), item 4(ii)
Rules of the High Court 1980 O 53

GS Nijar (*Meenakshi Raman* and *Thayalan* with him) (*Meena Thayalan & Partners*) for the plaintiffs.
Shafee Abdullah (*CG Oh* with him) (*Shafee & Co*) for the first defendant.
Stanley Isaac (Senior Federal Counsel) (*Abu Bakar Jais* with him) for the second and third defendants.
JC Foong (Sarawak State Attorney General) for the fourth and fifth defendants.

James Foong J: The plaintiffs in this action are residents of longhouses of Long Bulan, Uma Daro and Baku Kalo in the district of Belaga, the seventh division of Sarawak. Sometime in September 1993, the Federal Cabinet of Malaysia announced its approval of the proposed development of a hydroelectric project in the seventh division of Sarawak, an area known as Bakun covering approximately 69,640 hectares of land to meet the long-term power and energy requirements of the nation. It involves three stages: the creation of a reservoir, construction of a dam and the transmission of the generated electric power from Sarawak in East Malaysia to Peninsular Malaysia by transmission cables which will, for a greater part, be submerged across the South China Sea. This project, which is commonly termed the 'Bakun Hydroelectric Project' ('Bakun HEP') will, according to the plaintiffs, directly and adversely involve the destruction of their longhouses, ancestral burial sites as well as land and forests from which they seek shelter, livelihood, food and medicine — all of which they claim to have a strong cultural attachment.

Under the Environment Quality Act of 1974 ('the EQA') — which was passed by the Federal Parliament of Malaysia and became law on 15 April 1975 — certain activities to be prescribed by the Minister charged with the responsibility for environment protection ('the Minister') can only be carried out with the approval of the Director General of Environmental Quality ('the Director General'), who is the second defendant in this action. This, as the long title of the EQA specifies, is for the 'prevention, abatement, control of pollution and enhancement of the environment and the purpose connected therewith.' Section 34A of the

EQA imposes a duty upon any person who carries out any of the prescribed activities to submit a report to the Director General in accordance with the guidelines prescribed by the Director General. This report should contain an assessment of the impact such activity which is proposed to be carried out will have, or is likely to have, on the environment and a proposal of measures that shall be undertaken to prevent, reduce or control any adverse impact on the environment. (This report shall be known as 'EIA').

According to para 3.4.7 of the Handbook of Environmental Impact Assessment Guidelines ('the Guidelines') passed and approved by the Director General, a detailed EIA prepared by the proponent of the project must be made available to the public. And under para 4.5 of the Guidelines, the public are invited to comment on the proposed project to a review panel, which is an independent body of experts or representatives of interested organizations appointed with the prime task of reviewing a detailed EIA and to evaluate the environmental, development costs and benefits to the community. This review panel will formulate its recommendation to the Director General for his consideration and decision on its approval.

By an order known as the 'Environment Quality (Prescribed Activities) (Environmental Impact Assessment) Order 1987' numbered as PU(A) 362/87 ('PU(A) 362') which came into effect on 1 April 1988, the Minister prescribed a number of activities to be 'prescribed activities' falling within the EQA. One such activity in item 13(b) is:

> 13 Power Generation and Transmission:
>
> (b) Dams and hydroelectric power schemes with either or both of the following:
>
> (i) dams over 15 meters high and ancillary structures covering a total area in excess of 40 hectares;
>
> (ii) reservoirs with a surface area in excess of 400 hectares.

However, on 27 March 1995, the Minister, purportedly 'in exercise of the powers conferred by s 34A of the EQA' by an order known as the 'Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) (Amendment) Order 1995' numbered as PU(A) 117 ('PU(A) 117') 'disprescribe' or 'unprescribe' (terms used by counsel for the first defendant), inter alia, item 13(b) of the prescribed activity made by him in PU(A) 362. This PU(A) 117 was gazetted on 20 April 1995. The mode used in s 2 of this amendment order reads as follows:

> 2 The Environment Quality (Prescribed Activities) (Environmental Impact Assessment) Order 1987 is amended by inserting, after paragraph 2, the following paragraphs:
>
> 3 In relation to the State of Sarawak, this Order shall not apply in respect of the prescribed activities listed in the First Schedule of the National Resources and Environment (Prescribed Activities) Order 1994 published under Part 11 of the Sarawak Government *Gazette* dated 11 August 1994, save that if there are any inconsistencies between the two Orders, this Order shall prevail.

A 4 Notwithstanding paragraph 3, the prescribed activities listed as Items 2, 5(a) and (b), 8, 9, 10, 12, 13(a), (c) and (d), 15, 16 and 18 in the Schedule shall continue to apply in respect of the State of Sarawak.

One of the most controversial provisions of this amendment order is that it 'shall be deemed to have come into force on 1 September 1994'. In B short, the provisions herein are made to apply retrospectively.

Sarawak — as early as 1949, before she joined Malaysia — had a legislature known as the 'Natural Resources Ordinance' ('the Sarawak Ordinance'). Under s 11A(1) of the Sarawak Ordinance, a state Natural Resource Board ('the Sarawak Board') created under this Ordinance C could prescribe certain activities, which inter alia 'may injure, damage or have adverse impact on the quality of the environment or the natural resources of the state', to require the approval of the Sarawak Board before they could be implemented. On 5 July 1994, the Sarawak Board by an order known as the 'Natural Resources and Environment (Prescribed Activities) Order 1994' ('the Sarawak Order'), besides prescribing certain D activities which requires the Sarawak Board's approval, also lays down procedure for the application for such approvals. In respect of procedure, it requires the project proponent to submit to the Sarawak Board an EIA for the board's consideration. The fundamental difference between this Sarawak Order and the Guidelines is essentially the entitlement to a copy of the EIA by the public and the subsequent public comments to the E review panel before an approval can be granted by the Director General. The Sarawak Order does not contain such provisions. This, basically, is the discontentment of the plaintiffs. Of course, one of the prescribed activities in the Sarawak Order includes, under item 4(ii), the 'construction of dams, artificial lakes or reservoirs with a surface area of 50 hectares for F impounding water' and under s 2(2) of the same Order, 'measurement of area shall be construed to mean the minimum area prescribed ...'

The first defendant is the project proponent of the Bakun HEP. The plaintiffs claimed that on 7 March 1994, the EIA for the Bakun HEP was commissioned and subsequent to this, there were various public G pronouncements by government leaders that the EIA would be made available to the public for their comments and views before approval. Through the exhibits annexed to the first plaintiff's affidavit were also letters from the Minister assuring certain public interest groups that all EIA procedures under the EQA for this project have to be complied with and public views will be considered. Suddenly, on 1 April 1995, the Press H reported that the first defendant's chairman had claimed that the first segment of the EIA submitted by his company had been approved by the Director General and with this, the first defendant would be able to start preparatory works at the lower end of the reservoir, which involved the clearing of 69,000 hectares of forest. A few days later, on 7 April 1995, the Director General in a Press release clarified that the EIA prepared by the I first defendant is:

> ... subjected to the Sarawak Order and not the Federal Government regulations. All prescribed activities relating to the development of land, water, forestry, agriculture and other natural resources in Sarawak are

> subject to the Order (the Sarawak Order), including the construction of hydroelectric dams ... ; since Ekran Bhd's (the first defendant) submission was made after the Order came into force, it is within the Board's (the Sarawak Board's) purview to review and approve it. The first part of the EIA submitted by Ekran Bhd two months ago was accordingly considered and approved on 27 March — *The New Straits Times Press* on 7 April 1995

as found in exh E of the first plaintiff's affidavit affirmed on 5 May 1995. It is pertinent at this stage to note that the Sarawak Order, though made on 5 July 1994, was also enacted to be effective retrospectively to 1 September 1994.

By these acts of the defendants, the plaintiffs claim they have been deprived of their accrued/vested rights to obtain a copy of the EIA, to be heard and make representations before the EIA is approved. They are now seeking 'a declaration that before the first defendant carries out the prescribed activity, víz the construction of the Bakun HEP, the first defendant has to comply with the EQA including s 34A of the said Act and/or the guidelines prescribed by the second defendant under s 34A of the said Act and the regulations made thereunder.'

The third defendant is the Government of Malaysia, while the fourth and fifth defendants were added into these proceedings upon the suggestion of this court and agreed upon by all parties then present, principally for the reason that the subject matter concerns and involves them.

As expected, the plaintiffs' application brought a barrage of objections from all the defendants which raised numerous legal issues. For the sake of clarity, this court shall deal with each of them under separate headings.

Locus Standi

The defendants submit that the plaintiffs have no locus standi to bring this action; in short, they have suffered no specific, direct or substantial damage other and different from that which was common to all the rest of the public.

The learned Attorney General of Sarawak enlightens this court of the fact that there are over 9,000 inhabitants in the area that would be flooded as a result of the creation of the reservoir for the Bakun HEP, plus another 2,000 people residing in the proposed water catchment area. This totals approximately 10,000 natives affected by the Bakun HEP and any damage so caused by this project is not peculiar or special to the plaintiffs alone. In any event, any loss of their land, houses and crops will be compensated in accordance with the provisions of the Land Code of Sarawak and not to be remedied by a declaration that the first defendant must comply with the EQA.

The law on locus standi in a public action has been extensively and comprehensively detailed in the learned judgments of Salleh Abas LP in *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12 at p 20. There is no necessity for this court to repeat them except to proceed straight into the elaboration of the principles expounded. It was agreed by two (Salleh Abas LP and Hashim Yeop Sani SCJ) of the three majority judges in the above-mentioned case that the best approach to the determination of locus

A standi is the proposition pronounced by the (then) Supreme Court in the case of *Tan Sri Hj Othman Saat v Mohamed bin Ismail* [1982] 2 MLJ 177 at p 179, which is as follows:

> The sensible approach in the matter of locus standi in injunctions and declarations would be that as a matter of jurisdiction, an assertion of an
B infringement of a contractual or a proprietary right, the commission of a tort, a statutory right or the breach of a statute *which affects the plaintiff's interests substantially or where the plaintiff has some genuine interest in having his legal position declared*, even though he could get no other relief, should suffice (Emphasis added.)

C A perusal of the plaintiffs' affidavits, without any creditable evidential challenge from the defendants, confirms that the plaintiffs are natives to the area affected by the Bakun HEP. They have claimed that their homes and land will be destroyed, their lives uprooted by the project and they will suffer far more greatly and directly than other members of the public. To them, 'our land and forest are not just a source of our livelihood but
D constitute life itself, as they are fundamental to our social, cultural and spiritual survival as native people.' This itself, in the opinion of this court, is sufficient to justify the plaintiffs having a substantial or genuine interest to have a legal position declared.

The plaintiffs may be just three members of a community of 10,000
E affected by the Bakun HEP, but as Viscount Radcliffe in *Ibeneweka v Egbuna* [1964] 1 WLR 219 aptly put (at p 226):

> ... there has never been any unqualified rule of practice that forbids the making of a declaration even when some of the persons interested in the subject of the declaration are not before the court ... Where, as here,
F defendants have decided to make themselves the champions of the rights of those not represented and have fought the case on that basis, and where, as here, the trial judge takes the view that the interested parties not represented are in reality fighting the suit, so to say, from behind the hedge, there is, in their Lordships' opinion, no principle in law which disentitles the same judge from disposing of the case by making a declaration of title in the
G plaintiffs' favour.

Enforcement of a public duty on which a penal sanction is provided

Section 34A of the EQA imposes a duty on any person who carries out any of the prescribed activities to submit an EIA to the Director General.
H When a project proponent proceeds with the project without the approval from the Director General of the EIA, he commits a breach of s 34A of the EQA, and under s 34(A)(8) of the EQA, he:

> ... shall be guilty of an offence and shall be liable to a fine not exceeding ten thousand ringgit or to imprisonment for a period not exceeding two years or
I to both and to a further fine of one thousand ringgit for every day that the offence is continued after a notice by the Director General requiring him to comply with the act specified therein has been served upon him.

By this decree, the defendants claim that the EQA has provided a provision for criminal prosecution on a penal offence in the event of contravention

or breach of s 34A of the EQA. When such penal remedy is created by statutory provision, a declaration sought for by the plaintiffs as private individuals cannot be entertained. This is supported by the (then) Supreme Court decision in *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12, where Abdul Hamid CJ (Malaya)(as he then was) held (at p 32) that:

> With all due respect to the learned judge, my view is clear in that fundamentally where a statute creates a criminal offence by prescribing a penalty for the breach of it but not providing a civil remedy — the general rule is that no private individual can bring an action to enforce the criminal law, either by way of an injunction or by a declaration or by damages. I am inclined to the view that it should be left to the Attorney General to bring an action, either of his own motion or at the instance of a member of the public who 'relates' the facts to him: see *Gouriet v Union of Post Office Workers & Ors* [1977] 3 All ER 70.

The reason behind this is best put by Salleh Abas LP in the same case as follows (at p 26):

> It is unacceptable that criminal law should be enforced by means of civil proceedings for a declaration when the court's power to grant that remedy is only at the discretion of the court. Jurisdiction of a criminal court is fixed and certain. The standard of proof in a criminal case is different from that required in a civil case and moreover the Attorney General is the guardian of public interest and as the Public Prosecutor, he, and not the court, is in control of all prosecutions. How can a prosecution of this nature be done behind his back? These are some of the most serious objections to the exercise by a civil court of its discretionary power relating to declaratory and injunctive remedies. Our system requires the public to trust the impartiality and fair-mindedness of the Attorney General. If he fails in his duty to exhibit this sense of fairness and to protect public interest of which he is the guardian, the matter can be raised in Parliament or elsewhere.

However, there can be two exceptions to this rule as pointed out by the learned Attorney General of Sarawak acting for the fourth and fifth defendants. This is expounded in the judgment of Lord Diplock in *Lonrho Ltd & Anor v Shell Petroleum Co Ltd & Anor (No 2)* [1982] AC 173 at p 185, which is consistent with *Government of Malaysia v Lim Kit Siang*. The exceptions are:

> The first is where upon the true construction of the Act it is apparent that the obligation or prohibition was imposed for the benefit or protection of a particular class of individuals as in the case of the Factories Act and similar legislation ...
>
> The second exception is where the statute creates a public right (ie a right to be enjoyed by all those of Her Majesty's subjects who wish to avail themselves of it) and a particular member of the public suffers what Brett J in *Benjamin v Storr* (1874) LR 9 CP 400 at p 407 described as 'particular, direct and substantial' damage 'other and different from that which was common to all the rest of the public.'

Even on these exceptions, the learned Attorney General of Sarawak contends that the plaintiffs have failed to satisfy the first. The EQA, he submits, is for inter alia 'the prevention, control of pollution and enhancement of the environment and to regulate prescribed activities.' In short, it is only a

A regulatory system for environmental quality control and the enhancement, without reference to any class or body of persons for whom such control or enhancement is to benefit; such an Act is not for the protection of any class of the public, but for the public generally.

Mr Nijar, arguing for the plaintiffs, disagrees. He submits that by
B looking at the EQA, it is apparent that the obligations for public participation in an EIA before approval — as provided by paras 3.4.7 and 4.5 of the Guidelines — are imposed for the benefit of the interested public. Though this court may agree that it may be for the benefit of the interested public, it is without reference to any particular class or body. It certainly does not grant protection to any class of the public but only to the public at large.
C For this, in the opinion of this court, the plaintiffs do not fall within this particular exception.

On the second exception, this court finds the circumstances of this case more applicable particularly to the findings of this court under the heading of 'Locus Standi'. The plaintiffs are natives to the location where
D the Bakun HEP is to be carried out. Operations of this project involve cutting down trees, diverting natural water flow and submerging large tracts of land with water. This obviously involves the destruction of the plaintiffs' homes and land and they would have to be relocated as admitted by the defendants. When the forest which is an integral part of the plaintiffs' lives is destroyed, such a deprivation would certainly uproot and
E immensely affect their lives. These sufferings and damages definitely are 'particular, direct and substantial' to the plaintiffs themselves, which are obviously different and apart from what other members of the public would suffer. The plaintiffs may only be three of a community of 10,000 but, as uttered earlier, numbers is not the criteria for the granting or
F refusal of declaratory relief. What is fundamental is that the plaintiffs themselves have in this case suffered specific, direct and substantial damages caused by the Bakun HEP. Within this exception, this court finds that the plaintiffs are entitled to seek their declaration prayed for in this application, even though statutory provision in this case subscribes a criminal offence which provides for a penal remedy.

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Justiciable and the Power of the State Legislature to Make Laws

In quoting the Singaporean case of *Salijah bte Ab Lateh v Mohd Irwan Abdullah* [1996] 1 SLR 63 at p 69, the learned Attorney General of Sarawak points out that the power to make declaratory judgment is confined
H to several principles, one of which is that it must be restricted 'to matters which are justiciable in the High Court.' With the assistance of the learned senior federal counsel acting for the second and third defendants, they explain that environment per se is an abstract thing. It is multi-dimensional so that it can be associated with anything surrounding human beings. The
I power to legislate on environmental matters would, therefore, necessarily depend on specific activity to which the environmental matter relates. In this respect, both Parliament and the state legislatures of Sarawak are competent to make laws on environmental impact provided that they are confined to activities which are identified in the Constitution as belonging to their respective legislative jurisdiction. For this, the following provisions

on the legislative jurisdiction between states and the federal authority need to be elaborated.

(1) Under art 73 of the Federal Constitution, while Parliament may make laws for the whole or any part of the Federation, the Legislature of the State may make laws for the whole or any part of the State.

(2) Under art 74 of the Federal Constitution, Parliament's power to make laws is in respect of matters enumerated in the Federal list or the Concurrent list (that is to say, the list I or list III as set out in the Ninth Schedule of the Federal Constitution).

(3) Under art 77 of the Federal Constitution, the legislature of the State has power to make laws with respect to any matters not enumerated in any of the lists set out in the Ninth Schedule, not being a matter in respect of which Parliament has the power to make laws. This power is called the residual power of legislation and it is preserved for the State Legislatures.

(4) Article 95B of the Federal Constitution accords special legislative powers to the States of Sabah and Sarawak. The supplement to List III (known as 'List III A') in the Ninth Schedule is deemed to form part of the Concurrent List ('List III') and the matters enumerated in that list is deemed not to be included in the Federal List ('List I'). In this supplement to the Concurrent List is the power of the State of Sarawak to make laws on 'the production, distribution and supply of water power and of electricity generated by water power' (List III A 13).

(5) In addition to the express powers given under the Ninth Schedule of the Federal Constitution to the State of Sarawak to make laws, the Yang Di-Pertuan Agong acting under art 95C read together with art 76A of the Federal Constitution has given powers to the State of Sarawak to make laws inter alia, on 'Electricity and distribution of gas.' This is under the Borneo States (Legislative Powers) Order 1963 LN 17.5.

(6) Under the State List (List II), and supplementary list to List III (List IIIA) of the Ninth Schedule of the Federal Constitution, together with the additional express powers made under Borneo States (Legislative Powers) Order 1963 LN 17.5, the State of Sarawak has exclusive jurisdiction to make laws affecting land use, forestry (which includes the removal of timber and biomass), impounding of inland water, diversion of rivers, electricity and the production of electricity generated by water, including the removal of burial sites.

(7) In respect of environmental impact, it is neither in the Federal List (List I), or the Concurrent List (List III), and the defendants claim that under art 77 of the Federal Constitution, the State of Sarawak is lawfully entitled to legislate over such matters, as seen to be carried through the Sarawak Ordinance and the Sarawak Order.

From the above, the learned senior federal counsel points out that in respect of the Bakun HEP, the state of Sarawak has competent and exclusive jurisdiction to govern the relevant activities involved. The Minister, recognizing this fact and removing any inconsistency between Federal and State jurisdiction, by PU(A) 117 excluded the application of EQA on certain relevant prescribed activities to the state of Sarawak. The operation of the Sarawak Order, he claims, is never dependent upon PU(A) 117; the Minister has prescribed the material activities, the most relevant of which

A is the construction of dams and hydroelectric power schemes in PU(A) 362, at a time when the Sarawak Ordinance had not been amended yet to include a new s 11A for Sarawak to assume identical powers and jurisdiction as in s 34A of the EQA. To grant the declaration sought for by the plaintiffs, in the opinion of the learned Attorney General of Sarawak, would mean:

B

> the court is seeking to enforce on the state of Sarawak, laws and regulations which Parliament did not have legislative authority to enact, or the constitutionality of such law is questioned, and with regard to which, there are already state laws and regulations for environmental protection and enhancement.

C These are matters not justiciable for this court to consider.

The response from the plaintiffs contained in Mr Nijar's reply is that the environment has increasingly become a subject matter of international concern and the Malaysian Government — since the Stockholm Conference in 1972 — has participated in international conferences, entered into D treaties, been signatories to international conventions and agreed to be internationally bound by protocols relating to environment. The country has carried out these actions as part of its obligations in external affairs. To effect these international commitments, the Federal Government must have power at national level to pass laws relating to matters located within E the states, otherwise its external affairs obligations will be impaired. He cites the Convention on Biological Diversity, which Malaysia is signatory, that imposes binding obligations on the government to pass laws for the preservation and sustainable use of all the rich flora and fauna within the country. Matters concerning the environment is, therefore, an external affairs power which the federal legislature has power under the Federal F List (List I) to enact laws.

Before one embarks upon this issue, it is relevant to determine the definition and meaning of the word 'justiciable'. Edgar Joseph Jr SCJ (as he then was) in *Petaling Tin Bhd v Lee Kian Chan & Ors* [1994] 1 MLJ 657 at p 672 has undertaken this task and found in *Black's Law Dictionary* (5th G Ed, 1983) at p 1004, on the meaning of the term 'justiciability':

> The term refers to real and substantial controversy which is appropriate for judicial determination, as distinguished from dispute or difference of contingent, hypothetical or abstract character: *Gui-marin & Doan Inc v George Town Textile Mfg Co* 249 SC 561, 155 SE 2d 618, 621.

H To begin with, this court wishes to reiterate that the issue before it is not what is the appropriate legal measures to safeguard the environment; which seems to be the undertone of Mr Nijar's reply, and if allowed to proceed further would completely blur the relevant issues before this court. Basically, from the arguments and a scrutiny of the plaintiffs' I application, the nucleus of the plaintiffs' challenge is on the validity of PU(A) 117, in relation to the procedural aspect of its enactment. This does not involve the determination of the jurisdictional aspect between state legislation and the Federal Parliament concerning who has the legislative power on various matters, either listed or not listed in the Ninth Schedule of the Federal Constitution. In any event, if there is such a

challenge, this court is not the proper forum for under arts 128(1) and (2) of the Federal Constitution, only the Federal Court to the exclusion of any other court can decide any question whether a law made by Parliament or by the legislature of the state is valid. There certainly is no application of such nature before this court.

Irrespective of whether there is a state law existing concurrently with a federal law, this court shall not be hampered in its determination to grant or refuse a declaratory relief, if found justifiable to do. If there is any inconsistency or conflict of the laws, then it is up to the respective executive authority or its relevant legislation to resolve such matters in accordance with the correct and appropriate procedure as laid down by law. One does not expect an individual (whose right is affected either by a state or federal legislation) in an attempt to enforce his right granted either by a state or federal legislature to be defeated by a claim from the respective executive, each claiming it has the rights and powers to enact the material piece of law and doing nothing to resolve this. If the executive from either the state or federal body has chosen to ratify and resolve such conflicts, the least he can do is to do it correctly according to the law. If it is carried out incorrectly or no action ever taken at all, the courts should not stand idly by to allow the concerned parties involved to take advantage of this situation. In a declaratory relief, which is an all-purpose remedy used in an extraordinary variety of cases, the court will weigh the advantages of granting a declaratory relief against the disadvantages, with the minimum requirement to achieve justice to deal with the aggrieved party's claim at hand. In this case, the issue before this court concerns the validity of PU(A) 117 in its procedural aspect of its enactment. This is a real and substantial controversy which this court has jurisdiction to determine, irrespective of whether there exists a state law or a federal legislature governing a similar underlying subject matter. For this, this court finds that the matter to be determined is justiciable for this forum.

Ultra Vires

(*a*) *Power to 'disprescribe'*

The plaintiffs claim that under s 34A of the EQA, the Minister's power is restricted to prescribing of activities to fall under the EQA. He has no power to suspend the application of PU(A) 362 to the state of Sarawak for this does not fall within the terms of the enabling provisions of s 34 of the EQA.

Section 34A(1) of the EQA provides:

> The Minister, after consultation with the Council, may by order prescribe any activity which may have significant environmental impact as prescribed activity.

By implication, it is the opinion of this court that he, too, has corresponding power to (borrowing the words of Mr Shafee, counsel for the first defendant) 'disprescribe' or 'unprescribe' any prescribed activities. This approach is necessary to give full effect to the objective of the EQA, which in the long title spells out as:

> An Act relating to the prevention, abatement, control of pollution and enhancement of the environment and for the purposes connected therewith.

As society progresses, environmental characteristics and values also change, caused either by human attitude, depletion of the subject matter or the inapplicability of a prescribed activity. Environmental matters do not remain static, and the constant change in its character requires the Minister to prescribe as well as disprescribe to move with times. When Parliament has delegated the Minister with power to prescribe any activity, it would be unjustifiable for him to return to the distinguished house on every single activity he wishes to disprescribe which, in his opinion, has become unnecessary or inapplicable. To interpret s 34A(1) EQA strictly is to tie the hands of the Minister when change has come and is needed. This would create an impractical approach which certainly is not the intention of Parliament.

(*b*) *Retrospectivity*

PU(A) 117, though in the form of an order by the Minister, is subsidiary legislation according to s 3 of the Interpretation Acts 1948 and 1967 ('Interpretation Act'). Section 20 of the Interpretation Act permits this piece of subsidiary legislation to be made retrospective, deeming it to come into force on 1 September 1994 when it was only gazetted on 20 April 1995. However, Mr Nijar points out that though PU(A) 117 can be made retrospective, it was not done so under s 20 of the Interpretation Act. Instead, PU(A) 117 was expressly made 'in exercise of the powers conferred by s 34A of the EQA 1974.' Again s 34A of the EQA, he claims, has never provided the Minister with a power to amend the law retrospectively. If the Minister wishes to avail himself of the provision of s 20 of the Interpretation Act which empowers him to amend retrospectively, he must cite this provision explicitly but this is not apparent in PU(A) 117. In support of this contention, he quoted the case of *Howe Yoon Chong v Chief Assessor, Property Tax, Singapore* [1978] 2 MLJ 87, where Rajah J at p 90 held that:

> The Minister in this matter exercised his powers under s 63 of the Act; if he had wished to exercise his powers under the Interpretation Act he should have said so in his declaration, which he did not. He has exercised his powers only under s 63 of the Act, and s 63, as can be seen from a plain reading of it, gives him no power to levy fees.

Though the senior federal counsel was quick to point out that the above case was overruled by the Singapore Court of Appeal reported in *Chief Assessor, Property Tax, Singapore v Howe Yoon Chong* [1979] 1 MLJ 207, the Court of Appeal did not make any specific comments to the above proposition. As rationally held by the English Court of Appeal in the case of *R v Secretary of State for the Home Department, ex p Al-Mehdawi* [1989] 1 All ER 777 at p 781, where an appellate court (the House of Lords in this case) expressed no view on the soundness or otherwise of the reasoning of the court below, the decision of the court below has a 'powerful persuasive influence on that particular issue.

This court is certainly influenced by the proposition of Rajah J above and to a greater extent by the decision of Eusoff Chin J (as he then was)

in *Wong Pot Heng & Anor v Kerajaan Malaysia* [1992] 2 MLJ 885, where the learned judge, with clarity and precision has this to say (at p 893):

> ... s 20 of the Interpretation Acts does not apply to emergency regulations made under s 2 of the 1979 Act (Emergency (Essential Powers) Act 1979). Since s 2 of the 1979 Act itself does not contain any provision empowering the Yang Di-Pertuan Agong to make emergency regulations with retrospective effect, I hold that both the new regs 9B and 13(2) inserted into the regulations by the amending regulations are invalid in so far as it purports to operate retrospectively.

Similarly in our case, there is no express provision in the EQA to permit the Honourable Minister to make any amendments retrospectively. Section 34A(1) of the EQA empowers the Minister to prescribe any activities as prescribed activities including, as this court has ruled, making of amendments thereto to cater for changes, but these changes are in anticipation of the future and not for the past. The Minister has explicitly stated in the operative part of PU(A) 117 that he enacted this order in exercise of his powers conferred by s 34A of the EQA, but when the purported enacting provision does not provide him with a right to make amendments retrospectively, he in turn acquires no such right to do so under that particular provision of the statute. A perusal of other sections in the EQA also reveals no provision for the Minister to amend subsidiary legislation retrospectively. If he wished to avail himself of the powers in s 20 of the Interpretation Act to give effect to the retrospectivity of his Order, he must, as stated above, say so expressly. But no utterance was ever made, nor is there any strong indication that he did so in this amending order.

The proposition in *Wong Pot Heng*'s case has been criticized by the defendants for relying too heavily on Indian and English authorities where no similar provisions such as our s 20 of the Interpretation Act exists in both those countries. This contention is completely unjustified, when the rational of strict interpretation of this section is based on the equitable and general principle that legislation should 'deal with future acts, and ought not to change the character of past transactions carried upon the faith of the then existing law ...' per Willes J in *Phillips v Eyre* (1870) LR 6 QB 1.

It is pertinent at this point to also refer to s 30 of the Interpretation Act, which provides under sub-s (1)(b) that:

> 30(1) The repeal of a written law in whole or in part shall not —
>
> (b) affect any right, privilege, obligation or liability acquired, accrued or incurred under the repealed law; or
>
> ...
>
> and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing law had not been made.

The essential element of this provision for the purpose of this case centers upon the question of whether the plaintiffs have acquired any rights. The defendants, of course, have strenuously argued that the plaintiffs have

A acquired no right nor been granted any under the EQA and all the subsidiary legislation related thereto. On the other hand, the plaintiffs have insisted upon a vested and/or an accrued right to a copy of the EIA and to be heard and make representation. Thus, in order to decide on this matter, the EQA and its subsidiary legislation must be examined.

B To start off with, s 34A(2) of the EQA provides that the EIA 'shall be in accordance with the guidelines prescribed by the Director General ...'. With this, the Guidelines become a subsidiary piece of legislature when published by the Director General. Under paras 1.4.5, 1.6.1, 3.4.7 and 4.5 of the Guidelines, public participation in the form of obtaining a copy of the EIA, commenting thereto and making representation is explicitly C provided and in fact encouraged for a 'responsible, interested and participating public is important in environmental management.' All these are to be complied with before the review panel makes its recommendation to the Director General who, in turn, takes into consideration these recommendations before arriving at a decision. This process is, therefore, D mandatory and any decision made by the Director General without the above procedure being adhered to will be against the legal provisions of the EQA and its subsidiary legislature. With this, the entitlement to a copy of the EIA, commenting thereon by the public becomes a right, and for this the plaintiffs are entitled to such rights. Denial of these rights would be contrary to the legal provisions and therefore should be rejected. E Consequently, since PU(A) 117 is a piece of legislation that repeals a written law and since the rights of the plaintiffs are affected by its effectiveness, s 30(1) of the Interpretation Act also prohibits it from being valid.

Mr Shafee then argues that, in the alternative, PU(A) 117 did not F extinguish any vested/accrued rights of the plaintiffs; it merely amended the procedure for the approval of the EIA from the Director General to the Sarawak Board under the Sarawak Ordinance. This line of approach could be related to the principle expressed by Lord Brightman in *Yew Bon Tew & Anor v Kenderaan Bas Mara* [1983] 1 MLJ 1 (at p 2) where:

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> ... no person has a vested right in any particular course of procedure, but only a right to prosecute or defend a suit according to the rules for the conduct of an action for the time being prescribed.

In the opinion of this court, this argument is most unattractive for all intents and purposes. PU(A) 117 is not about a transfer of procedure, but H the extinction of the EQA in its application on certain material activities in the state of Sarawak. The Sarawak Ordinance and the Sarawak Order by far are completely different pieces of legislation which, from the arguments of the learned Attorney General of Sarawak and the senior federal counsel, stand on their own footing, separate and apart from the EQA. Though it I may regulate on a similar prescribed activity as the EQA, they are based on its own enactment with separate and distinct procedures. Where a right to prosecute an action exists, as in this case for the plaintiffs, it is no longer procedural but substantive.

Usefulness

The learned Attorney General of Sarawak questions the usefulness of this declaration sought for by the plaintiffs. He emphasizes that after the EIA was submitted by the first defendant, it was deliberated and approved by the Sarawak Board which consisted also of the Director General as one of its members. Under such circumstances, what useful purpose would it serve by ordering the first defendant to re-submit an EIA to comply with s 34A of the EQA? For after all, the Director General will similarly approve it as he did as a member of the Sarawak Board.

This submission is rather insubstantive as it is elementary that it is not the Director General who approved the EIA in Sarawak, but the Sarawak Board. He may be a constituent of the Sarawak Board but, it is not in his capacity as the Director General under the EQA to approve the EIA. The Sarawak Board and the Director General under the EQA are two separate institutions, each guided by its own set of legal procedures and the most notorious difference is the absence in the Sarawak Order of the right of the public to a copy of the EIA, and the right to be heard and make representation before the approval of the EIA is granted. This difference may change the whole course of things as input through public participation as provided by the Guidelines may cause the approving authorities under the EQA to take an entirely different cause of action, or to impose certain conditions that may be beneficial to the project and the public as a whole. The very essence of EQA is to formulate 'measures that shall be taken to prevent, reduce or control the adverse impact on environment.' To achieve this, as laid down under the Guidelines, public participation is necessary, for after all, the interaction between people and their environment is fundamental to the concept of impact. Thus, it is relevant, and indeed mandatory for the authorities to hear the views of the public first, before granting its approval. Even if the views of the public are rejected, of which they are entitled to do, at least the law as promulgated by the elected representatives of the people is being followed. It makes a mockery of the whole issue to say that the EIA can be approved first and if the public has any constructive ideas, they can submit later. This certainly is illogical, deprived of good sense and sound reasoning.

Motives

The fourth and fifth defendants question the motive of the plaintiffs in applying for the declaration sought. They feel that the underlying objective of the plaintiffs is to avoid losing their land, crops, houses, and ancestral burial sites if the Bakun HEP is to proceed. The plaintiffs' concern, they add, 'is not about environment per se, but about matters which can only be resolved under the provision of the Land Code of Sarawak; by their actions, the plaintiffs can bolster their case against imminent extinguishment of their rights over state land occupied by them under native customary tenure.'

Indeed, the plaintiffs are apprehensive that their land, crops, houses and ancestral burial sites will be devastated if the Bakun HEP is to proceed. But this does not extinguish their vested rights to make representation and be heard before the EIA is approved by the Director General under the EQA and its lawful subsidiary legislation. Relevant provisions of the Land Code of Sarawak may deal and settle the affairs of the plaintiffs relating to their land, but these are matters to be of concern only after the relevant approval is granted to the first defendant under the EQA. The rights of the plaintiffs under the EQA are distinct and separate from the rights under the Land Code of Sarawak which, this court is confident, also provides adequately for the plaintiffs. But this does not mean that just because the plaintiffs wish to enforce their rights under the EQA they possess a sinister motive as claimed. In any event, the affidavits of the plaintiffs disclose their genuine concern of the environmental impact of the Bakun HEP, and all they wish is to be granted a right to obtain a copy of the EIA, be heard and make representation before the EIA is approved. Being people directly and peculiarly affected, the plaintiffs would authoritatively be able to contribute some constructive views for consideration by the authorities; after all, the concept of environmental impact is the interaction between people and their environment.

Proper Procedure

(*a*) *Mandamus*

The first defendant complains that the plaintiffs are seeking a declaration to compel them to comply with the EQA, but however, upon closer scrutiny, the substance of the plaintiffs' grievances are actually against the second and third defendants for the purported abdication of its statutory powers. Thus, the appropriate procedure is an order of mandamus against the second defendant to exercise its statutory duty under O 53 of the Rules of the High Court 1980 and not by way of this declaration.

In the opinion of this court, this conception is rather restrictive in modern times when there is a dynamic development of declaratory Order in the field of administrative law. The appropriate approach should be those expressed by the authors de Smith, Woolf and Jouell in *Judicial Review of Administrative Actions* (5th Ed) at p 753:

> Normally a court will not be deterred from the granting of a declaration because some alternative remedy is available. The fact that on an application for judicial review an applicant could have obtained an order of mandamus or prohibition is no reason for refusing declaratory relief. The court in practice will adopt an entirely pragmatic approach and having taken into account the wishes of the parties will grant the form of relief most likely to resolve satisfactorily the disputes between the parties.

Based on this, this court will not refuse the plaintiffs' application solely on the ground that an alternative remedy is available. Instead, this court will consider the granting of the form of relief most likely to resolve the disputes between the parties.

(*b*) *Collateral Attack*

The learned Attorney General of Sarawak has accused the plaintiffs of mounting a collateral attack when there is no jurisdictional defeat visible on the face of PU(A) 117. He supported this allegation with the case of *Penang Development Corp v Teoh Eng Huat & Anor* [1993] 2 MLJ 97, where the dictum suggests that a collateral attack is not permissible when, ex facie the order does not include obvious jurisdictional defeat. The illustration from *Wade on Administrative Law* (6th Ed) at p 333 was adopted by the learned judge in *Penang Development Corp*'s case to explain the situation where collateral attack is allowed in cases when the order is bad on the face of it. An example of such a case is where action for damages is brought against magistrates and judges of inferior courts on account of orders made by them outside their jurisdiction. Such orders being bad on the face of it could be treated by the court as invalid and the court shall proceed directly to hear the claim for damages. PU(A) 117 as it stands, claims the learned Attorney General of Sarawak, has no obvious ex facie jurisdictional defeat which would entitle the plaintiffs to skip an initial claim to invalidate this order first, before proceeding onto a request for an order to compel the first defendant to comply with the EQA. In short, this submission is that the plaintiffs should have mounted a direct attack.

Mr Nijar, in his reply, immediately explains that it was not the motive of the plaintiffs to carry out a collateral attack. He narrates the change of events caused by the executive in altering the law which now makes the plaintiffs' application appear like a collateral attack. He gives the following chronology of events to explain his position:

> *On 20 April 1995*, the plaintiffs filed this application consequent to the Director General's disclosure on 7 April 1995 that the Bakun HEP was no longer under his jurisdiction.
>
> *On 20 April 1995*, the same date as this application was filed PU(A) 117 was gazetted with retrospective effect from 1 September 1994, which is the same day as the coming into force of the Sarawak Order.

With this change, the nature of the plaintiffs' claim appears to be a collateral attack when it was not at the time of filing, for s 34A of the EQA, PU(A) 362/87 and the Guidelines were all effective and operational to the whole of Malaysia. To remedy this, Mr Nijar now seeks an amendment to his first prayer in this application with the inclusion of '... and that the Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) (Amendment) Order 1995 is invalid.'

Firstly, this court finds these explanations tendered by the plaintiffs acceptable to explain the approach undertaken by them which now appears to be in the form of a collateral attack. To overcome such procedural objections, the amendments sought should be allowed, as they have answered all the questions positively posted in the proposition stated in *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213 regarding amendments.

A On the first question of whether the plaintiffs' application is bona fide, this court, after evaluating the explanation given by Mr Nijar on the change of circumstances caused by the retrospective nature of the relevant legislation and the contents of the submissions by all parties, finds no other cause for the plaintiffs to make this application except with bona fide B intention. For the second question of whether prejudice will be caused to the defendants by this amendment, this court finds none, for throughout the entire argument of the parties the nucleus is whether this amendment order PU(A) 117 is valid. The defendants have, in fact, based their entire submissions on this point and covered practically all angles of this issue. This amendment will not prejudice them but will deal with the actual issue C so raised by all parties. In respect of the final question of whether the amendment would not in effect turn the plaintiffs' claim from one character into another and inconsistent character, this court finds in the negative. The plaintiffs' claim is for a declaration to compel the first defendant to comply with a specific provision of the EQA, but to do so now, in view of D the purported amendments made through PU(A) 117, it is necessary to mount a direct attack lest it be accused of being in the nature of a collateral attack. The main characteristic of the original prayer has not been changed by this proposed amendment, for it is the continued insistence of the plaintiffs that the EQA still applies. In order to do so now, it is only E appropriate that the amendment be included so that it will be comprehensive. However, for the sake of correct order, this court hereby allows the proposed amendment to take precedent, rather than subsequent, to the existing words contained in prayer 1. This would put all matters squarely in its proper prospective.

F *Conclusion*

The power of this court to make a declaration is almost unlimited, except 'limited by its own discretion' (Sterndale MR in *Hanson v Radcliffe Urban District Council* [1922] 2 Ch 490 at p 507). However, as cautiously warned G by Edgar Joseph Jr SCJ (as he then was) in *Petaling Tin Bhd v Lee Kian Chan & Ors* [1994] 1 MLJ 657 (at pp 674–675):

> ... decided cases still afford guidance, at the very least, as to what factors the courts have in the past regarded as relevant when exercising their discretion as to whether to grant or refuse declaratory relief. Broadly stated, the court must weigh the advantages of granting declaratory relief as against the H disadvantages. The minimum requirement must be to achieve justice between litigants and that is 'a subject on which experience may teach the courts of one generation to take what they may regard as a wider or more liberal view than that of their predecessors' (see *Brickfield Properties v Newton* [1971] 3 All ER 328 per Sachs LJ at p 335 speaking of the rules of practice and procedure).

I From the facts and arguments presented, it is understandable why the plaintiffs are aggrieved. The legislature of Malaysia has enacted the EQA to be applicable on the entire nation. Subsidiary legislations relating

thereto were made by the executive delegated with powers to do so. This, obviously, is to give full effect to the meaning and purpose of the EQA. Under the guidelines prescribed by the Director General, as provided for under the EQA itself, a valid assessment of an EIA prepared by the project proponent of the prescribed activities cannot be made without some form of public participation (para 1.4.5 of the Guidelines). This is essential, for interaction between people and their environment is fundamental to the concept of environmental impact (para 1.6.1 of the Guidelines). For this, a right is vested on the plaintiffs to obtain and be supplied with a copy of the EIA coupled with the right to make representation and be heard. While waiting to exercise their rights and being assured by executives through their leaders — including those directly in charge that the relevant procedures of the EQA will be adhered to — the Minister suddenly strikes a mortal blow by gazetting PU(A) 117. Though it is claimed by the defendants that this amendment order only alters the procedure in the evaluation of the EIA on the Bakun HEP, in substance and in fact and visible to all, it tantamounts to the removal of the entire rights of the plaintiffs to participate and to give their views before the EIA is approved. This court shall not stand idly by to witness such injustice especially when the plaintiffs have turned to this institution to seek redress. If the minimum requirement for the granting of a declaration is to achieve justice, then based on the facts and law of this case, the plaintiffs amply qualify. For these, this court hereby grants:

(i) a declaration that the Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) (Amendment) Order 1995 is invalid;

(ii) and a declaration that before the first defendant carries out the prescribed activity, viz the construction of the Bakun HEP, the first defendant has to comply with the EQA including s 34A of the said Act and/or the guidelines prescribed by the second defendant under s 34A of the said Act and the regulations made thereunder; and

(iii) costs to the plaintiffs.

Order accordingly.

Reported by Ng Sheau Jiuan